Action By Department of Justice To Enforce Federal Marijuana Laws Is Inconsistent With State and Local Laws Protecting Marijuana Users

On January 3, 2018, Attorney General Jeff Sessions rescinded three Obama-era memos, known as the "Cole memo," that provided for a federal policy of non-intervention in states with marijuana-friendly laws. The move gave federal prosecutors wide discretion in how to prioritize their resources to combat possession, distribution, and cultivation of marijuana in the nine states, plus the District of Columbia, where recreational use has been legalized.

This decision came just days after recreational marijuana use became legal in California, the highest-populated market in the world to legalize the drug thus far. Voters in California approved the measure in November 2016, but the commercial sale of marijuana under state law only went into effect on January 1, 2018. California has permitted medical marijuana use for two decades, and 29 states, plus the District of Columbia, allow qualifying patients to use marijuana for medicinal or rehabilitative purposes.

The Justice Department's policy shift is seemingly at odds with an amendment to a congressional budget rider prohibiting the use of federally appropriated funds to interfere with state-sanctioned medical marijuana operations. In *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), the Ninth Circuit interpreted this amendment to effectively immunize medical marijuana users and sellers complying with state law from criminal prosecution.[i] A Justice Department official said that prosecutors would respect the *McIntosh* decision while reserving their rights to prosecute individuals in states not covered by the decision. Sessions has argued vehemently against the amendment's continued inclusion in the budget rider. In his view, it allows drug traffickers to hide behind state medical marijuana laws as they illegally cultivate and distribute marijuana. He has also doubled down on his rhetoric against marijuana use, maintaining that "good people don't smoke marijuana" and the drug is "in fact a very real danger."

Ironically, Sessions' hardline approach has galvanized pro-marijuana policymakers across the country. On January 22, 2018, in response to his decision regarding the Cole memo, Vermont became the first state to legalize marijuana through legislation as opposed to ballot initiatives.[ii] In March 2018, Congress rejected Sessions' entreaties and again included the marijuana amendment as part of its new spending bill, which will fund the federal government until the end of September. In April 2018, Sen. Chuck Schumer announced that he would introduce legislation to remove marijuana from Schedule I of the Controlled Substances Act (CSA). Also in April, President Donald Trump promised Sen. Cory Gardner that he would support legislation protecting Colorado and other states that have legalized recreational marijuana use from the Department of Justice. Finally, many members of Congress are supporting the Marijuana Justice Act, modeled after California's Proposition 64, that would legalize marijuana under federal law and allow individuals convicted of marijuana possession to clear their criminal records.

Despite the mixed messages coming out of Washington, the possession and use of marijuana, for any purpose, is still illegal at the federal level. However, employers should be wary of state laws that prohibit discrimination against medical marijuana users. Until recently, case law supported employers' discretion to fire or refuse to hire individuals who tested positive for marijuana. Two cases in 2017 challenged this status quo. In July 2017, the Massachusetts Supreme Judicial Court

ruled that state law requires an employer to accommodate an employee's use of medical marijuana. *See Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (2017). Even more surprisingly, a Connecticut district court judge held that federal law does not preempt Connecticut's Palliative Use of Marijuana Act (PUMA), which protects employees and job applicants from employment discrimination based on their lawful use of medical marijuana. *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F. Supp. 3d 326, at 338 (D. Conn. 2017). Despite lacking an express statutory enforcement mechanism, the Court ruled that PUMA provides employees and job applicants with an implied private right of action with respect to the law's anti-discrimination prohibition. *Id.* at 340.

In 2015, plaintiff Katelyn Noffsinger was prescribed medical marijuana to treat her post-traumatic stress disorder (PTSD). She registered with the Connecticut Department of Consumer Protection and began taking Marinol (a.k.a. dronabinol), a synthetic form of marijuana, every night before bed. *Id.* at 331. In July 2016, Ms. Noffsinger was recruited for a position with defendant Bride Brook. She informed the company of her use of Marinol as a "qualifying patient" under PUMA to treat her PTSD. Nevertheless, Bride Brook rescinded her job offer after learning that she had tested positive for cannabis in her mandatory pre-employment drug test. *Id.* at 332. In August 2016, Ms. Noffsinger sued the company in Connecticut Superior Court. Bride Brook removed the case to federal court and filed a motion to dismiss, arguing that the PUMA claim was preempted by the CSA, Americans with Disabilities Act (ADA), and Food, Drug, and Cosmetic Act (FDCA).

The Court found no federal preemption of PUMA. While "the CSA makes it a federal crime to use, possess, or distribute marijuana," it neither prohibits employing marijuana users nor attempts to regulate employment practices. *Id.* at 334.[iii] The Court then explained that while the ADA contains "an illicit-drug-use exception" to its protections, it does not authorize employers to take adverse employment actions based on an employee's illicit drug use outside of the workplace. *Id.* at 337.[iv] Finally, the Court found that PUMA does not conflict with the FDCA's goals, even though it permits drug use that the Food and Drug Administration has not approved. *Id.* at 338 ("[T]he FDCA does not purport to regulate employment."). Therefore, an implied private right of action does exist under PUMA's anti-discrimination prohibition. *Id.* at 340-41 ("[W]ithout a private cause of action, [PUMA] would have no practical effect, because the law does not provide for any other enforcement mechanism.").

Bride Brook indicated that it will appeal to the Court of Appeals for the Second Circuit. Still, *Noffsinger* marked the first time a court has found that marijuana's status as an illegal drug under federal law does not bar a plaintiff's state-law discrimination claim. The decision may have a dramatic impact on employers in states that provide affirmative employment protections for authorized medical marijuana users. Both *Barbuto* and *Noffsinger* could signal a shift toward affording greater protections to employees who use medical marijuana under state law, forcing employers to reevaluate their zero-tolerance workplace drug policies and drug-testing programs.

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[i] *See also United States v. Samp*, 2016 U.S. Dist. LEXIS 171732 (E.D. Mich. Dec. 13, 2016) ("The language of § 542 clearly prohibits the [Justice Department] from expending funds to prevent Michigan from implementing its own state law regarding the use, distribution, possession, and cultivation of medical marijuana.").

[ii] Governor Phil Scott begrudgingly signed the law, legalizing possession of up to one ounce of marijuana. However, he rejected the tax-and-regulate model adopted in other states that have legalized marijuana, where sales of the drug reportedly generated over $9 billion in tax revenue in 2017. As a result, critics are fearful that the majority of Vermont's commerce involving marijuana will remain underground and unregulated.

[iii] *Cf. Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industry*, 230 P.3d 518 (Or. 2010). Unlike PUMA, Oregon's medical marijuana statute lacked a provision explicitly barring employment discrimination. *See also EEOC v. Pines of Clarkston*, 2015 U.S. Dist. LEXIS 55926 (E.D. Mich. Apr. 29, 2015) (denying defendant's motion for summary judgment on plaintiff's discrimination claim under Michigan's Persons With Disabilities Civil Rights Act, which alleged that defendant refused to hire her not for her medical marijuana use but for her epilepsy).

[iv] Neither the Court nor the parties addressed the fact that Marisol may be prescribed under the CSA as a Schedule III drug. Thus, while Ms. Noffsinger's state-law discrimination claim was also potentially actionable under the ADA, the Court's decision might have limited value in future cases involving Schedule I or II drugs.